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In the

Supreme Court of the United States

October Term, 1924

BOSCOE IRWIN, Former Collector of Internal Revenue,
Petitioner,

against

E. PALMER GAVIT,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

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IN THE

Supreme Court of the United States

ROSCOE IRWIN, Former Collector of Internal Revenue, *Petitioner,* against E. PALMER GAVIT, *Respondent.*	No. 325 October Term, 1924.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

The undersigned respectfully move the Court for leave to file the accompanying brief in this case as *amici curiae.*

This application is made as counsel for Mabel Brady Garvan, a beneficiary under the seventh paragraph of the will of Anthony N. Brady, being the same will and the same paragraph under which respondent takes. The provision made by said will for Mrs. Mabel Brady Garvan is as follows:

> "SEVENTH. All the rest, residue and remainder of the real and personal property of which I may die seized or possessed, I direct my executors and trustees to divide into six equal parts, and I give, devise and bequeath the same as follows:
>
> * * * * * *

> "One part, to my executors and trustees, in trust, nevertheless, for the following uses and purposes, to-wit: To collect and receive the rents, income and profits thereof and after paying all necessary expenses to pay over the same to my daughter, Mabel Brady Garvan, in equal quarter-yearly payments during her life. Upon her death, if her husband Francis P. Garvan survives her, I direct that said net rents, income and profits be paid to him during his life, and upon the death of the survivor of my said daughter and her said husband, I give, devise and bequeath the capital of said trust estate to her issue, share and share alike, per stirpes, and if she leaves no issue living at the termination of the trust, to my issue, share and share alike, per stirpes."

Large sums were assessed as income taxes against Mabel Brady Garvan, under the Federal Tax Act of 1913, on the payments made to her under the above provision of said will, on the claim that said payments constituted taxable income to her; the taxes so assessed were paid by her under protest. The question presented by her protest arises out of the same will, relates to the same residuary fund created by paragraph seventh of said will; and therefore she has in fact just as vital an interest in the case as does respondent.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

JOHN W. DAVIS,
FRANK DAVIS, JR.,
Counsel for Mrs. Mabel Brady Garvan.

IN THE

Supreme Court of the United States

ROSCOE IRWIN, Former Collector of Internal Revenue, *Petitioner,* against E. PALMER GAVIT, *Respondent.*	October Term, No. 325 1924.

BRIEF IN SUPPORT OF RESPONDENT

The Questions Presented

The question is—whether money paid to a beneficiary from year to year for a certain period or for life pursuant to a bequest of net income, said beneficiary having no present or future interest in the corpus of the fund which creates such income, is taxable as income to such beneficiary under the 1913 income tax law.

The estate—capital—which produces the rents, income and profits so payable to the beneficiary is in the hands of trustees. The beneficiary under the laws of New York has no right, title or interest in said capital other than to be paid the income thereof during a certain period, which right cannot be anticipated or assigned; he has no control whatever over the capital fund and at a certain time, by the terms of the will, it goes to other persons therein designated. This is then simply a bequest of rents, income and profits—a gift of the same.

The broad contention of the Government is that the yearly payments of the rents, income and profits so bequeathed or given, constitutes taxable income of the beneficiary.

We maintain—

1. That the money received by respondent is property acquired by bequest; a legacy.

2. The legacy received by respondent, being property acquired by bequest, is expressly excepted from taxable income by Section II, B of the 1913 Act.

3. The legacy to respondent consisted of the moneys to be paid to him from time to time under the terms of the will and not of a mere naked right to receive them.

4. Under the laws of the State of New York the respondent had neither ownership nor use of nor interest in the corpus of the testator's estate. His title was in the income in that alone.

5. That the income is collected by the trustee is immaterial.

6. To construe the Income Tax Law as applying to a legacy would make it to that extent unconstitutional.

7. The construction sought by the Government would make the Act arbitrarily discriminatory. Such construction is to be avoided if possible.

ARGUMENT

I.

The money received by respondent is property acquired by bequest, a legacy.

The tax here concerned is charged against the beneficiary on money received by him during the taxable year. Obviously, the first step in considering the validity of the tax is to determine accurately the character of the fund sought to be taxed, as the money constituting the same is from time to time received into the hands of the taxpayer. This is done by ascertaining from what source such money is derived and how it comes to the recipient. There can be no doubt as to this; it comes to him by virtue of a will and in no other way; it is a bequest of the earnings or the increase, during a certain period, of a capital fund which belongs to someone else. It is therefore a bequest, a gift, for a bequest is a gift of personal property made by will. "The word 'bequest' is commonly defined as a gift of personal property by will * * *". *United States* v. *Merriam* (1923), 263 U. S. 179, 184. Legacy and bequest so far as this case is concerned are interchangeable terms; as there is no claim made that the bequest is made in payment of a debt or for services to be rendered. It is a pure gratuity.

> "In common acceptation, 'bequest' and 'legacy' are synonymous terms, but 'bequeath' is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed." (*In re Campbell's Estate* (1904), 27 Utah 361, 75 Pac. 851, 853, *Page on Wills,* (2).

There can be no doubt that money, payable quarterly under a will to a beneficiary for a certain period is a

pure bequest, legacy or gift. No other character can possibly be attributed to it. While this is so plain as to require no support from authority, such authority exists and is of absolute uniformity.

> "Within the limits of the rule against perpetuities the law recognizes the right of the testator to dispose of the income of his property by will, and gifts of this sort are constantly upheld. And where testator manifests a clear intention, he may give the income separate and apart from the principal, so that the beneficiary has no interest whatever in the property from which the income is derived.
>
> The intention to separate the income from the principal is generally manifested either by creating an express trust or by limiting the interest to a life interest in the income only." *Page on Wills,* Page 691, §599, and cases there cited.

In the Matter of Stanfield (1892), 135 N. Y. 292, 31 N. E. 1013, there was a bequest to the son of the testator of the income for life on a fund of $20,000.00; at his death said fund to go to another. The Court, in its opinion, states (pp. 294, 295, 297):

> "Where the income of an estate, or of a designated portion, is given to a legatee for life, we think it is clear that he becomes entitled to it whenever it accrues, and, if the estate is productive of income from the death of the testator, he can require the executor to account to him for the income from that time. * * * In the present case the bequest is not of a part of the principal of the estate, or of any property possessed by the testator in his lifetime; but of that which is to arise or accrue after his death from a specified fund to be set apart for that purpose. It is the income which constitutes the respondent's legacy. He is not seeking to charge the estate with interest upon his legacy, but is simply endeavoring to secure the legacy itself and his effort, therefore, involves no

infringement of the rule regulating the payment of interest upon general legacies.

"It is argued that the bequest of the income to the respondent and of the principal sum, out of which it is to arise, to the residuary legatee, are to be treated as but one legacy payable to different persons * * *. Such a construction cannot be adopted without doing violence to the language of the will. The gift of the income is independent of the gift of the principal; and the right to the income does not depend upon the investment, but was created and exists regardless of it. The direction to the executor, with respect to the investment of the fund, has reference to the administration of the trust, and cannot be available to defeat the legatee's title to income accruing previously to the time when the investment is required to be made.

" * * * If the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must be construed to invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intent is to be inferred. The statutory time of payment of the income to the legatee is not affected by this construction. He must still wait, as the respondent did, until the expiration of one year from the grant of letters before payment of the income can be demanded, but he is then entitled to his share of the net income which has previously accrued."

See also:

In re Von Keller's Estate (1899) 59 N. Y. Supp. 1079, aff. 62 N. Y. Supp. 1150, 47 App. Div. 625;

In re Gurnee (1914) 147 N. Y. S. 396, 84 Misc. Rep. 324, aff. 150 N. Y. S. 1088, aff. 214 N. Y. 660, 108 N. E. 1095.

It is, of course, settled that the construction of a New York will by a New York Court is binding as to the meaning and effect of the will, and that the construction by the State Court determines not only legally, but practically, the extent and character of the interest taken by the legatees. See *Uterhart* v. *United States* (1916), 240 U. S. 598, 603, where it is stated:

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore*, 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In *Disston* v. *McClain* (1906) 147 Fed. 114 (C. C. A. 3rd Cir., Certiorari denied, 207 U. S. 587), the Court stated at page 117:

> " • • • The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each, contingent, before vesting, on the legatee's being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman Case, until and as it takes effect in possession or enjoyment."

See also:

Lynch v. *Union Trust Co.* (1908), 164 Fed. 161 (C. C. A. 9th Cir.), Certiorari denied (1909), 214 U. S. 523;

Westhus v. *Union Trust Co.* (1908), 164 Fed. 795 (C. C. A. 8th Cir.), Dismissed (1913), 228 U. S. 519;

U. S. v. *Fidelity Trust Co.* (1911), 222 U. S. 158;
McCoach v. *Pratt* (1913), 201 Fed. 1021 (C. C. A. 3rd Cir.) Aff. (1915) 236 U. S. 569;
Kahn v. *United States* (1921), 257 U. S. 244.

all of which cases, while involving Statutes not here concerned, recognize that amounts received by a beneficiary under a will out of the corpus of the estate are to such beneficiary gifts or bequests.

Numerous other cases might be cited, from the same and other jurisdictions. However, in our reading, no contrary authority has been found.

It may be here noted that the gift herein concerned does not include the right to possess the corpus even during life.

There is no difference in the essential characteristic that must determine the nature of the moneys derived from a bequest for years or for life as herein conceived, and any other bequest. Such bequests are gratuities, given by the owner to some one else, in no sense earned or accumulated by the recipient, not earned or accumulated by any capital to him belonging.

It is true that sums distributed to the beneficiaries of a trust estate are not infrequently spoken of as income in the sense that they flow from the capital fund; but what is income to one may be in every sense capital to another. Annual distributions to life beneficiaries are as truly gifts or bequests of capital to them as if given in a lump sum as specific legacies.

A man, living, may direct a mortgagee to pay the interest on the first of each month to his wife for twelve months. The interest is an income which has flowed from his capital and upon which he is doubtless taxable, but to the wife there can be no doubt that each payment is a

gift equally as if the husband on the first of each month himself handed her a check. Neither the fact that the mortgagee pays her instead of the husband, nor that the payments were in the first place income to the husband, nor that they continue over a period of time can alter the quality or nature of the gift to her. She has been given no title or right in the capital producing the interest or income; that capital remains the sole property of the husband, who has in effect severed the interest or income therefrom and given it to the wife.

A man by the creation of a trust may similarly sever principal and income and by the imposition of duties upon his representatives, his trustees, which will be enforced by a court of equity, may insure the payment of his gift of income even after his death. To follow our illustration, the trustees own and hold the mortgage or principal from which the interest or income is derived; each month they, instead of the husband, receive the interest and give it to the wife. Each payment is derived from exactly the same capital as in the husband's lifetime, and each payment is equally his gift to her, regardless of his death or the length of time during which the gifts or bequests may continue.

The effort of the Government to define the gift to the beneficiary as a mere "right to receive" and to treat the quarterly payments as "income" flowing from this intangible right, is the purest metaphysics. It in no way corresponds to the facts with which tax laws must deal.

Where the corpus of a trust estate consists, for instance, of one thousand shares of stock, the money which the beneficiary receives flows from that stock and not from his right to demand that the trustees carry out the testator's intention. This equitable right creates no gain. If the corporation whose shares are owned passes a dividend, no payment is made to the beneficiary and his "right to receive" will produce nothing in lieu thereof.

A man about to die may invest his whole fortune in coupon bonds of a maturity equal to his son's expectancy of life, and may direct his executor immediately upon his death to cut all the coupons and deliver them to his son, the bond itself to be held for his grandson. That gift or bequest consists of a certain number of coupons falling due on successive dates in the future. The coupons at once become capital to the son. He has received his bequest.

II.

The legacy received by respondent being property acquired by bequest, is expressly excepted from taxable income by Section II, B of the 1913 Act.

Section II, A (1) of the Act of 1913 (Act, October 3, 1913, chap. 16, 38 Stat. 114, 166) levies a tax upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, and to every person residing in the United States.

Section II, B (1) defines taxable income and is as follows:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from

> but not the value of *property acquired* by gift, bequest, devise, or descent."

The words "gift," "bequest," "devise," and "descent," as used in this statute, cover all *property* acquired by the owner gratuitously, and to that extent are synonymous. The owner in this case is Mr. Gavit, and the *property* acquired by him gratuitously under the will of Mr. Brady is the money actually paid to him. Without delivery to and possession by the legatee the gift to him is not complete. All that is ever delivered to and possessed by the legatee in this case is the money actually paid to him by the trustees. When so paid it is property acquired by bequest; for "acquire" means to get as one's own. He acquires the property itself by bequest, not as income on a bequest.

The contention is that the money paid Mr. Gavit is not *acquired* by bequest, but is *acquired by him* as income on a legacy. There is no authority cited to support this contention. The language of the statute is:

> " * * * the net income of a *taxable person* shall include gains, profits and income * * * including the income from but not the value of *property acquired by gift, bequest,* devise or descent."

This means just what it says; the taxable person is to be taxed on the income on property *he has acquired by bequest* and which is owned by him. The argument of the Government would necessarily require the application of the statute to two taxpayers instead of one, taxing one taxpayer on the income on a corpus that belonged to some one else. The statute contemplates property acquired by bequest in the hands of one taxpayer and income on that property, produced by it, coming in to the same individual, the owner. Where is the bequest acquired by Mr. Gavit and held by him producing the money

which the Government desires to tax? How is the money sought to be taxed acquired by Mr. Gavit if it is not acquired by bequest? The exception of the statute applies explicitly to this money so acquired; after he has acquired it, if it produces income, then to that income, produced by his legacy, the taxing statute applies. There is no qualification whatever to the statutory exception; no definition of bequest from which it could be argued that when a legacy is of income, or interest, it is not a property acquired by bequest. The exception in the statute was made for the purpose of disclaiming any attempts on the part of Congress to include property acquired by gift or bequest as taxable income, and to make certain, by taxing only the income on gifts and legacies, that the law would not be subject to the same attack made in *Pollock* v. *Farmers Loan & Trust Company,* 158 U. S. 601. The exception is absolute.

The Government entirely misconceives the purpose of the exception. The body of Section II B (1) (without the exception) clearly includes income on a gift or bequest; it includes *all* income. Certainly the exception was not inserted to again include such income. Exceptions are not embodied in statutes to give emphasis by repetition. The exception was inserted for the very purpose it specifies; namely, to except from taxable income something that would be embraced by the statute without the exception; namely, property acquired by gift or bequest. The provision that the income on such property shall be included is added as an additional safeguard to the disclaimer of any attempt to tax the gift or bequest itself.

Income on property acquired by bequest is, of course, taxable, but it must be income on such property and not the property itself. There is nothing in any of the income tax laws or in any of the decisions of this

Court construing the same which gives the slightest warrant for a construction that would draw a distinction between legacies and hold that when a person gives income which belongs to him to some one else that such a legacy is not acquired by the beneficiary by bequest, but is income on the legacy so acquired. There is nothing in any of said Acts or decisions which gives any authority for construing a bequest of income to a beneficiary for life not as a legacy, but as income on a legacy. The income tax is a tax on tangible property, on money received by the taxpayer during a certain period, on money that must come under the definition that has been settled by this Court, and under the very statute the Government invokes it must be income to the taxpayer, not property acquired by bequest.

III.

The legacy to the respondent consisted of the moneys to be paid to him from time to time under the terms of a will and not of a mere naked right to receive them.

The position of the Government, though not so expressly stated in its brief (pages 3, 16) logically is as stated in the following quotation from page 3 of its Petition for certiorari:

> "Petitioner contends that the actual legacy received by Gavit was the right to enjoy, under certain conditions, a portion of the income of the trust estate, a vested and valuable beneficial interest which no attempt was made to tax; but that the moneys paid to Gavit out of the income of the trust on account of said interest clearly constitute income derived from said legacy and as such were

> specifically taxable under the provisions of Section II-B of the Income Tax Act of 1913, *infra.*"

and the following from page 5:

> "What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income of said trust estate. On this interest there was no tax because he received it as a bequest. On the other hand, what moneys Gavit received from the trustees of the estate were payments of income on the right which was the subject of the bequest."

We have referred above to this contention of the Government as metaphysical rather than legal. Whatever it possesses of plausibility is due solely to ideas based upon the procedure adopted in assessing and collecting, whether under State or Federal law, a succession or inheritance tax by way of excise upon the testator's death. Under such laws it becomes necessary in order to fix the amount of the excise to place a hypothetical value, with the aid of mortality tables, upon the legacies of the annuitant or life tenant. The value of his interest for purposes of such taxation is assumed to be the sum which it is estimated he would receive in cash if he lived out his expectancy. *Herold* v. *Kahn* (1908), 159 Fed. 608; *In re Stiles' Estate* (Sur.), 3 N. Y. Supp. 137; *In re Todd*, 12 N. Y. Supp. 642; *In re Grant's Estate*, 28 N. Y. Supp. 203.

Accordingly under the laws of the State of New York the present cash value of the bequest to the respondent Gavit was fixed at $2,732,972 and succession tax so paid on this basis. But it is certainly absurd to reason from this that all which Gavit receives from year to year during the duration of his legacy will be income, gain or profit arising from a vested beneficial interest valued at the foregoing figure.

What would be the contention of the Government if there were no constitutional objection to taxing property acquired by bequest, no statutory exception as to such property, no estate or excise tax, but simply an income tax on income actually received by the taxpayer, defined as including gains, profits and income derived from any source whatsoever? The Government contends that what Mr. Gavit actually received, his legacy, under the will was a vested and valuable beneficial interest. That vested interest was of the value of $2,732,972, fixed under the laws of New York. If the position of the Government is correct (there being no objection or exception) then certainly Mr. Gavit received a clear "gain" or "profit" during the year 1913 of $2,732,972, which would be subject to the income tax. In such situation would the Government contend that the tax would fall on said $2,732,-972 and not on the quarterly payments he received under the will?

The Government cannot expect to have it both ways. If what Gavit received as his legacy was "a vested and beneficial interest which no attempt was made to tax," possessing an estimated cash value under the mortality tables of $2,732,972, is it not clear that until at least that sum has been paid over to him he will receive nothing by way of income on his bequest, but merely the payment of his principal? Year by year portions of the capital value of his legacy will be received by him, but until the capital sum has been amortized by the payments so made, how can he be said to be in receipt also of taxable income to the same amount?

If the theory of the Government is correct and all that the beneficiary receives in cash is income to him, manifestly the manner in which the trust funds are invested can make no difference in the rule. The beneficiary's income, as the Government argues, is derived not

at all from the corpus of the estate but from his own naked right to receive. Yet, if the entire estate were composed of tax-exempt Government securities, would it be insisted that the interest thereon, non-taxable by law, loses this character at the moment of its delivery to the beneficiary? Would it not follow also that since the interest of the beneficiary is entirely extinguished by his death, an event the approach of which is inevitable, he should be entitled under the Government's theory to a yearly deduction to cover the diminishing value and depreciation of his "right to receive?"

In *Lynch, Executrix,* v. *Alworth-Stephens Company,* decided by this Court March 2, 1925 (No. 273, October Term, 1924), the Court in its opinion quotes the following from the opinion of the Circuit Court of Appeals:

> "And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

If plain fact and ordinary meaning of ordinary words are departed from, and it is held that what is paid to a beneficiary for life is not a legacy, *but income on a legacy,* then the legacy itself is an intangible thing, a gift, never received by or in the possession of the beneficiary, and vanishing at his death. And, if it could be possible to thus create and use intangible property for the purpose of an income tax, the taxpayer certainly must be entitled to allowances for exhaustion and depletion.

The exigency in this case is said to arise from the fact that if the practical and reasonable construction is placed on this statute, large sums will escape the income tax. This is true and they will rightly escape from being taxed as income, because they are not income, because they are

in the same class as very much larger sums which no attempt is made to tax as income by the Government; namely, all property acquired by gift, bequest, devise or descent. Taxing laws are to be liberally construed in favor of the taxpayer, discriminations are to be avoided. To tax one legacy, one form of gift, and not another is discrimination. To say, however, that such legacies will escape taxation is contrary to fact. Legacies can be taxed, have been and are severely taxed, in the only constitutional and fair way; that is by an estate or excise tax.

The statute says that the value of property acquired by gift, bequest, devise or descent, shall not be income for the purpose of taxation. It must be conceded as a matter of fact and common sense that what Mr. Gavit acquired under the will of Mr. Brady was the money actually paid him by the trustees. Applying the statute as it reads, this is not taxable income to him.

In *Vanderbilt* v. *Eidman*, 196 U. S. 480, 495, former Chief Justice White quotes the following language from *In Re Hoffman*, 143 N. Y. 327:

> "We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which

there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate,' or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained, the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

The income tax is more tangible than a tax on the clear value; it is a tax on the actual money received during a fixed period by the owner thereof; and the money Mr. Gavit received was property acquired by bequest of Anthony N. Brady.

In the present case the Government contends that the legacy was a valuable vested interest and that the amount received by Gavit was income on such legacy to him. Suppose Mr. Gavit had died at the end of the first quarter of the first year. Would it not be certain that the value of the bequest made to him by the will of Mr. Brady was the amount paid to him by the trustees upon the first quarterly distribution? If it were taxable income that amount would have to be income on his legacy, yet at his death his legacy would have been received in its entirety. There would be nothing over for his estate, nothing remaining whatever of his gift; he would

have used it all. How could this be taxable income if property acquired by bequest is specifically excepted by the statute?

That what a beneficiary for years (such as is Mr. Gavit) receives is actually his legacy has been definitely decided by the Court of Appeals of New York, *In the Matter of Tracy*, 179 N. Y. 501, 510, in giving instructions as to the incidence and payment of the New York Transfer Tax on a life annuity, the Court stated (p. 510):

> "We will now consider the second provision of the decree, from which appeal is taken, in reference to the annuity of three hundred dollars for the benefit of James Rohm, payable semi-annually. Annuities are expressly referred to by Section 230, as already quoted. The manner in which this annuity is dealt with in the decree of the learned surrogate is unsupported by the statute. The probable duration of the annuitant's life should be ascertained in the manner pointed out by Section 230, which is under the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities, etc. This fact being ascertained, the amount of the transfer tax is computed thereon and becomes forthwith payable out of the fund set aside for creating the annuity. (In this case it happens to be the residuary estate.)
>
> The method of returning to the residuary estate the tax so paid by the trustees is as follows: Take for illustration an annuitant whose probable duration of life is ten years. The trustees would deduct from each annual payment as made one-tenth of the tax and restore it to the residuary estate."

This rule has been actually applied to Mr. Gavit; the entire tax as fixed by the tables was first paid out of

the capital fund, and each year there is taken out of the payments to Mr. Gavit 1/14th thereof (14 years being the period of his gift) and restored to the principal fund. Thus the tax is directly upon the legacy, taken out of the money Mr. Gavit acquired by bequest.

We contend, therefore, that it has been specifically determined by the laws of New York, as interpreted and applied by the highest court of New York, that the legacy to Mr. Gavit is the money actually paid to him, that that was the property transferred to him under Mr. Brady's will, what he acquired by bequest, and that therefore this question has been finally determined and that this determination is binding (*Uterhart* v. *United States,* 240 U. S., 598, 603).

We have cited other authorities which show that the gift of interest on a fund is a gift of the interest only; and that a gift, or bequest of income, is just as much a gift or bequest as is one of capital. But aside from these authorities, which we submit are controlling, we think it clear that the bequest to a beneficiary for years or for life, his legacy, is the property itself which he acquires solely by the bequest, not a mere abstraction. That as a matter of fact what the beneficiary gets under such a bequest is the money actually paid to him while he lives; that this money is in truth and fact his legacy, and that the tax would fall, if valid, directly upon it.

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." *Nicol* v. *Ames* (1899), 173 U. S. 509, 516.

We contend that as a practical matter, regarding substance and not form, the beneficiary for life receives, not income as defined in the 16th Amendment, but a legacy consisting of actual money, property acquired by bequest.

As stated in *Eisner* v. *Macomber* (1920), 252 U. S. 189, 211:

> "Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the 16th Amendment."

In *United States* v. *Fidelity Trust Company* (1911), 222 U. S. 158, which concerned the question of taxation of a life estate in a fund under an *excise tax*, Mr. Justice Holmes states the facts in part, as follows (p. 159):

> "The petitioner, appellee, was residuary legatee under a will, in trust to hold the fund 'either as at present invested or in such securities as to my said trustee may be deemed safe,' and to pay over the net income to the testator's niece 'in quarterly payments during all the period of her natural life.' On June 8, 1900, the appellee made a return to the collector of internal revenue, stating that the value of the residuary estate was $120,303.94, and that of a specific legacy of silverware etc. to the niece, $500. With the aid of mortuary tables, the rate of interest being assumed to be 4 per cent, the clear value of *the legacies to the niece* was fixed at $74,678.68, and an inheritance tax of $5,600.90 was assessed upon it, which was paid on August 16, 1900. Up to July 1, 1902, the date fixed by the statute, the petitioner had paid to the niece $17,027.59 income from the residue, and had delivered to her the specific legacy valued at $500. The tax on these sums at the rate of taxation was $1,314.59, which, deducted from the whole tax paid, leaves $4,286.31, to recover which this suit is brought." (Italics ours.)

Thus, in that case the Court regarded the payments of income to the life tenant *as the legacies* given to her by the will, the value of which, as ascertained by mortuary tables for purpose of the tax, which was upon a vested interest, was an entirely different thing from the money actually received.

The income tax, however, as we have heretofore pointed out, is the antithesis of a legacy tax. It is based entirely on actualities. The matter of the value of the property producing the income of an individual (except in case of conversion of capital assets) is of absolutely no consequence. Income to an individual identical in amount is identically taxed no matter what may be the value of the property producing it. An income of $10,000 arising from property valued at $1,000,000 would be taxed at the same rate as income of a similar amount produced from property valued at $1,000. The only case in which the value of a life estate would have any bearing upon the income tax of the beneficiary for life would be if it were possible to assign or anticipate his interest, in which event it would perhaps be proper to calculate the value of the estate by mortuary tables and tax as income to the beneficiary for life the increase of the sale price, if any, over the value as so fixed. There is no difference between this and the valuation of any other property which does not have an absolutely fixed monetary value when ascertaining the gain on conversion thereof for the purpose of taxation.

We maintain that taxation is a practical matter and that no practical man could be convinced that a bequest to him of the income on $120,303.94 for life was in fact a legacy to him of $74,678.68; which he might never receive, or receive only in installments; or that the money which he received which was earned by said $120,303.94, duly invested, was not earned by such fund but was

earned by the mythical $74,678.68; or that what was given him by the will was not income on $120,303.94, but was in fact $74,678.68, and that the moneys which he received came to him from such mythical fund (which would vanish at the moment he died) and not from the actual existing fund of $120,303.94. (Figures from last cited case, *United States* v. *Fidelity Trust Company*, 222 U. S. 158).

Quoting again from *United States* v. *Fidelity Trust Co.* (1911), 222 U. S. 158, 159-60, Mr. Justice Holmes states, speaking of a life estate in a fund:

> "The interest of the niece was not a contingent right to income as it should accrue in her lifetime, it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity * * *. When it (the statute) speaks of interests [illegible] vested in possession, we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not *with the money received before a given moment.* No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun * * *" (Italics ours).

This was said with reference to a succession tax. Such a tax is based not on the bequest, or inheritance; that is, not on property because of its ownership and possession, but on account of its passage by will or by descent in cases of intestacy. *Knowlton* v. *Moore*, 178 U. S. 41, 78.

This is the kind of tax which "deals in terms with the interest, that is, the legal unit of right, *not with the money received before a given moment.*" This is in fact the distinction between taxes of this character and an income tax; the income tax deals distinctly with "*the money re-*

ceived before a given moment"; namely, all money which can be classed as income which has been received by the taxpayer during the taxable year.

Surely there is a distinction in fact between a right or interest and the money or property obtained by virtue of the right or interest. The Government says "the actual legacy received by Gavit was * * * a vested and valuable interest," and that the income paid to him is the income on said legacy. The bequest, however, as made by the will to Mr. Gavit, was not of a vested and valuable interest in the fund, but was that he be paid by the trustees of a certain fund a certain part of certain rents, income and profits during a certain period. The actual legacy was the income; that was the property and the only property he acquired by his bequest. The law gives him a right to such income for a certain period and an enforceable interest thereto. If he should not choose to enforce that right or interest he would receive no money—and no contention could be made that he had received income. The will enforced by the law gives him the right to acquire his legacy, to realize his legacy, to get it as his *own*. The payments made to him are not income upon this right—this interest—but are the realization of his right and constitute in themselves the real substance of his legacy.

In case of intestacy the law gives to the heir title to a certain portion of the intestate's estate; that is, a right or interest which vests in him and can be enforced, but we do not believe anyone will contend that the property actually inherited by such heir is income on such right or interest, though it undoubtedly constitutes a clear gain to him. This is true as to every legatee.

IV.

Under the laws of the State of New York the respondent had neither ownership nor use of nor interest in the corpus of the testator's estate. His title was in the income and in that alone.

The Government takes issue with the Court below as to the relation between the beneficiary and the corpus of the estate, arguing that under the statute the ownership of the fund producing the income is immaterial in determining whether or not it is taxable income to the recipient. The Circuit Court of Appeals did not base its conclusion on this fact but found that the moneys received by the respondent were not taxable because they were acquired by bequest (*Irwin* v. *Gavit,* 295 Fed. 84). The ownership of the fund producing the income, however, is important in determining what is and what is not taxable income, and this is shown by the language of the statute itself.

Section II, A, Subdivision 1, of the Act of 1913 levies the tax upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, and Section II, B (1) of said Act provides:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transac-

> tion of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent:"

Clearly this section recognizes the fact that income to a person, arising out of capital, can only arise out of the ownership, or use of, or interest in real or personal property, and the distinctive character of an income tax is that it is a tax directly on a person solely because of his ownership of property; that is, his ownership of the income received from his property during a certain period. *Knowlton* v. *Moore,* 178 U. S. 41, 80, 81. 82.

The Government reverses the rule that a taxing statute must be strictly construed in favor of the taxpayer gives no effect to the provision that property acquired by bequest shall be expressly excepted, and does not recognize that which we think clearly appears from the statute and from the definition of income as adopted by this Court; that taxable income must be monies received by the taxpayer on account of the exercise of his own physical or mental faculties, or from property actually owned by him. Anything received otherwise can only be a gratuity and is exempted from being classed as income by the law itself.

The money paid to the beneficiary certainly does not arise out of his use or his interest in the corpus of the fund. He has no use of the corpus whatever; no dominion of any kind over it, such as has a life tenant in possession. Nor does his "interest" in the corpus, whatever that may be, produce income. The money he receives is produced by the corpus itself, not by his interest therein.

In New York the rights of the beneficiary in a trust estate are prescribed by statute. Section 100, *McKin-*

ney's Consolidated Laws of New York, Real Property Law, with reference to real estate, is as follows:

> "§ 100. TRUSTEE OF EXPRESS TRUST TO HAVE WHOLE ESTATE. Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

This section has been held to be applicable to personal property under Section 11 of the Personal Property Law. Section 103 of the Real Property Law is as follows:

> "§ 103. WHAT TRUST INTEREST MAY BE ALIENATED. 1. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred.
>
> 2. The provisions of this section as here amended shall not impair or affect any rights existing on March twenty-fifth, nineteen hundred and three."

Section 11 of the Personal Property Law of New York (McKinney's Consolidated Laws of New York), reads:

> "§ 11. SUSPENSION OF OWNERSHIP. The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or con-

> tingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."

And Section 15 provides:

> "§ 15. PERSONAL PROPERTY NOT ALIENABLE IN CERTAIN CASES. 1. The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred. * * *"

So that the only right or interest the beneficiary has in the trust estate is to enforce the performance of the trust, or to prevent interference with the trustee in the performance of his duties. He has no right or control over the corpus whatever, and only a personal action against the trustee to enforce the payment of income accrued and received by the trustee.

We think for the purpose of this case generally it is immaterial whether the beneficiary's remedy is *in personam* or *in rem*. The question here is as to the taxability of money which has actually been received by him by reason of a bequest, and of which he is the absolute owner. His right thereto can be enforced by a personal action against the trustee. This *right* which he gets under the will and the law is to obtain property which the testator gave to him.

This is a New York case and the New York law and decisions are controlling, and under that law and those decisions the beneficiary has only a right *in personam* and is the owner of no interest or estate in the trust property. (Statutes above cited, *Bogert on Trusts, 428.*) Thus, clearly until the money is actually paid to him by

the trustee he has received nothing whatever under the will. He cannot anticipate or assign in any way his right or interest.

The income tax, as we have stated before, is a tax based upon actual money received by the taxpayer within a certain period. If that money so received is acquired by bequest, then by the terms of the statute it is not taxable. If the money paid to Mr. Gavit was not the legacy bequeathed to him by the will of Anthony N. Brady, then he has never received that legacy. The Government confuses the right with the property. The right is an intangible thing; it is the power attached by the law to a will or deed by which the possession of the property given by the will or granted by the deed may be obtained. Under the law and the will of Anthony N. Brady a right was vested in Mr. Gavit to enforce the delivery to him of the legacy given him by the will; namely, his portion of the specified income.

The Government relies on the case of *Maguire* v. *Trefry*, 253 U. S. 12, a case involving the income tax law of the State of Massachusetts. Of course, the States in the matter of income taxes are not limited by the 16th Amendment to the Federal Constitution, nor by the definition adopted by this Court as to what is income under that Amendment. This case, however, is helpful in showing the distinction between the right to a bequest and the bequest itself. The case below was *Maguire* v. *Tax Commissioner*, 230 Mass. 503; also in *Scott's Cases on Trusts*, p. 743. Chief Justice Rugg, in his opinion, says:

> " * * * The *cestui que* trust has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of

these is the right to receive the income. That is a property right. *The income when received is property.* The tax here in question is a property tax. *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531, 532.

* * * * * * *

"The income tax is measured by reference to the riches of the person taxed *actually made available to him for* valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden.

* * * * * * *

"It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston,* 5 Cu... 93 at page 99, 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It *affects only the income, after it has been paid to the trustee' to the beneficiary.*"

We also think that the opinion of Mr. Justice Day, in deciding the same case in this Court, makes the same distinction. *Maguire* v. *Trefry,* 253 U. S. 12, 16:

"It is this property right belonging to the beneficiary, *realized in the shape of income,* which is the subject matter of the tax under the statute of Massachusetts."

The property right in this case is the right to receive the legacy under the bequest of Mr. Brady, and that legacy, when realized—that is, got into actual possession by the beneficiary—in the shape of income, is property acquired by bequest.

The fact that a bequest of income for years or life is just what it purports to be—a gift of the income actually received by the beneficiary—is also illustrated by the cases in which the testator directs that the income shall be paid to the beneficiaries free from claims of creditors.

An illustrative case is *Broadway National Bank* v. *Adams,* 133 Mass. 170; Ames' Cases on Trusts, 2nd Edition, 397; Scott's Cases on Trust, 604. The Court states:

> "The question wheth · the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman* v. *Stiles,* 2 Pick. 460. *Perkins* v. *Hays,* 3 Gray, 405. *Russell* v. *Grinnell,* 105 Mass. 425. *Hall* v. *Williams,* 120 Mass. 344. *Sparhawk* v. *Cloon,* 125 Mass. 263.
>
> "It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223a. *Blackstone Bank* v. *Davis,* 21 Pick. 42.
>
> "Lord Coke gives as the reason of the rule, that 'it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien,' and that this is 'against the height and puritie of a fee simple.' By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; *the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him.* Neither the principal nor the income is at any time inalienable."
>
> * * * * * * *

"The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift which such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, *which upon its payment to him, and not before, was to become his absolute property.* His intentions ought to be carried out, unless they are against public policy."

When slaves were property in this country cases arose as to whether the increase of slaves granted to a person for life and then to another belonged to the life tenant or the remainder man. The question was largely decided in accordance with the terms of the will, the general rule based on humanity being that in the absence of some explicit provision in the will the children followed the mother and went to the remainder man, though the opposite result could be brought about if expressly provided for in the will. *21 Corpus Juris,* p. 1042; Section 6 and cases there cited. Assume that a will expressly provided that a female slave was to go to A for life, at the death of A to be free; and that the increase of said slave, during the life of A, should go to B abso-

lutely; could it be worked out on any hypothesis that a slave child coming to B under such a bequest was not the legacy itself?

The legacy is what the beneficiary actually received by virtue of the bequest. A bequest, like a gift, to be complete, requires delivery. What the life tenant or tenant for years gets is what the testator bequeathed him, whether it be capital or income. Of course, if capital and income go to the same person the estates are merged and the income from that time on is necessarily income to the owner of the capital.

In the present case the Government contends that what the recipient receives is income on a legacy; that he has a vested and valuable interest in the corpus.

In *Baltzell* v. *Mitchell,* 1 Fed. (2nd) 29, affirmed by the Circuit Court of Appeals, First Circuit, 3 Fed. (2d) 428, the beneficiary for life was required during the taxable year 1919 to pay a large income tax on moneys actually paid to her by trustees. She claimed a deduction on account of the fact that during that year the trustees sold securities at such a loss that there was in fact no net income to the trust estate. The claim was denied by the lower Court.

In the Court of Appeals the Government in its brief (pp. 17, 18) took the following position:

> " * * * In the present cases, the plaintiffs and the trusts are separate and distinct. The plaintiffs occupy no relation to the business carried on by the trusts, nor do they have any management or control over the corpus of the trusts. They receive periodically net amounts of income distributed after the expenses of administering the trusts have been paid. The plaintiffs have no right to securities held by the trusts, but only the right to receive their distributive shares of the

> income thereof pursuant to the instrument and order creating the trusts. The transactions out of which the alleged losses occurred, were carried on by the trusts and were not entered into by the plaintiffs or on their behalf for a profit, as the beneficiaries could not have availed themselves of any such profits, had profits resulted. If there had been a gain instead of a loss by reason of the sale of the capital assets, such gain would have become a part of the corpus of the trusts and would not have been distributed to the beneficiaries as income."

This contention was sustained by the Court of Appeals, the Court stating in its opinion (p. 430):

> "The beneficiary clearly has no distributive share in the net income of the estate or trust; but he has a distributive share of income to be paid him under and in accordance with the terms of the trust, and resort must be had to them to ascertain his proportion of the income or his distributive share. The beneficiary is not interested in the capital of the trust, but only in the income. If there are any accretions to the capital these are not distributable as income, so that the beneficiary may receive any part of them; and if there are capital losses they cannot be made good out of the income. The capital may be depleted by such losses; but the income for that taxable year is not. It may in future years be diminished because of the diminution of the capital."

It seems to us that the argument of the Government and the opinion of the Court necessarily demonstrate the propositions we are here contending for; that as a matter of fact, under the income tax Act the beneficiary has no tangible interest whatever in the corpus of the estate; that what he gets is a legacy given him by the will, which is the income, if any, segregated entirely from the corpus and only becoming his property when

he receives it. In other words, if he received a valuable, tangible property in the corpus, a legacy which produced his income, then the decision in the *Baltzell* case would undoubtedly be wrong and the beneficiary would be entitled to the deduction.

It is to be noted that in the *Baltzell* case the question which is presented in the case at bar was not raised and no claim was made that the money received by the beneficiary was not taxable because it was property acquired by bequest, and that question was not touched upon in the decision.

V.

That the income is collected by the trustee is immaterial.

The legal title to property given in trust is, of course, in the trustee. Thus, it may be argued as the trustee of a fund, the income from which is to be paid to another, is in law the owner of the fund, the income thereon is income to him as he is a taxable person. Without expressing ourselves as to the situation arising where the capital fund and the income thereon go to one person, constitute one gift, it is clear that the case we are in fact considering consists of two gifts of two different things and to different persons; a gift of capital to one person and a gift of the income on such capital to another. *Gibbons* v. *Mahon*, 136 U. S. 549; *In the Matter of Stanfield*, 135 N. Y. 292. The income tax is a direct tax on property which falls on the person to whom the property actually belongs when it is taxed. In this case there are two gifts; one of the capital to one person, the other of the income to another person.

As illustrated by *Field* v. *Hitchcock* (1835), 34 Mass. (17 Pick) 182, the legacy to the life tenant is a gift of the interest on the fund only, and it is the duty of the trustee to pay the interest only to the person entitled thereto for life and to preserve the principal for him who is entitled to take it afterwards. The trustee is the legal owner of the capital fund so long as the life estate is outstanding. He is also, for the purpose of collecting the same and paying it over to the beneficiary for life, the legal owner of the income. He is, however, only the legal owner. Neither the capital fund nor the income belongs to him. As stated by Justice Shiras in *Welles* v. *Larrabee* (1888), 36 Fed. 866, 870.

> "The word 'trustee' is one of significance. It is constantly made use of, not only in legal phraseology, but in common speech, to indicate that one holds the title to property, not in his own absolute right, but for the benefit of some other party or parties."

and by Mr. Justice Day in *Maguire* v. *Trefry,* 253 U. S. 12-16:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others' (2 Story's Equity 11th ed. 964). It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts."

We think the case of *Lederer* v. *Stockton* (1922), 260 U. S. 3, is directly applicable in principle. That case dealt with the exception granted on income received by

a corporation operated for charitable uses and purposes. There was a bequest of a residuary estate to the hospital, and it was necessary that the bequest remain in control of trustees appointed by the will until the termination of certain annuities. An arrangement was made by which the residuary fund was in fact placed in possession of the hospital and it paid a sum sufficient to cover the administration charges and remaining annuity, retaining the balance of the income for its own use; but, nevertheless the fund, the income of which went to the hospital, was constructively in the hands of the trustee. The Government maintained that the income on the property, while it was subject to the trust, was taxable and the exception did not apply. The Court overruled this contention and dealt with the matter as one of fact and estated (p. 8):

> "To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

The income tax falls upon the person to whom the income belongs as a matter of fact. Assume that A collects interest on money to the amount of $10,000 and gives it to B in trust to deliver to C at the end of a certain period. Is that income and not a gift to C simply because it passed through the hands of B? What is the difference if A, owning the fund that produces the interest, empowers B to collect the interest in trust to deliver to C? It is the same interest and the same gift; so with the testamentary trust. The income collected by the trustee either is a gift or it is not. The temporary possession of the trustee cannot alter the character of the property.

A trustee of a fund, charged with the duty of paying the income thereon to another, often in changing the in-

vestments makes a substantial capital gain. This is a gain accruing to the gift proper, the fund itself; constitutes no part of the gift and is properly taxable as income under the definition. *Merchants Loan & Trust Co.* v. *Smietanka* (1921), 255 U. S. 509. It will be noted that in this case, in the opinion of the Court it is stated (p. 517):

> "Thus, it is the plainly expressed purpose of the Act of Congress to treat such a trustee as we have here as a 'taxable person' and *for the purposes of the Act to deal with the income received for others precisely as if the beneficiaries had received it in person.*"

The statute is fully valid as applied to income received by a trustee, when the income so received is taxable income under the definition. If it is not taxable income if received by the beneficiary, it would be a contradiction both in fact and law to say that it loses its exceptional character while it is in the hands of an intermediary.

Assume a trust fund of $100,000, the income to the extent of $4,000 per year, by specification of the will, to be paid to the beneficiary for ten years, then the fund to go absolutely to another. Assume that the annual income on the fund is $6,000. $2,000 would undoubtedly be taxable income to the trustee, for it represents income on the gift which goes to the remainderman. It belongs to, goes to the fund of which the trustee is the legal owner. The $4,000, however, is not taxable, for it is a gift to the beneficiary and any tax assessed against it would be directly a tax on his gift; the fact that the check for the tax was issued by the trustee would in no degree lessen the directness of the burden upon the beneficiary.

Assume again that the bequest by special direction

of the will is of the income of a fund of $100,000, to the full extent of $6,000 per year for ten years, with direction to the trustee to make up any deficiency in such income from the capital. Assume that the fund only produces $4,000 a year, so that the trustee has to take $2,000 from the capital to fill out the gift. There would be no income whatever to the trustee; a capital expenditure instead. The gift to the beneficiary would be in fact part of the trust fund, part income thereon; to him, however, it would make no difference as to the source as it is a gift; to him there would be no difference between the $4,000 and the $2,000. The Government, we assume, would admit that the $2,000 is not income to anyone, yet so far as the beneficiary is concerned the $2,000 is just as much income to him as is the $4,000. The law speaks of income to the ultimate taxpayer; he who cannot shift the burden, on whose property the tax falls because he owns it.

VI.

To construe the Income Tax Law as applying to a legacy would make it to that extent unconstitutional.

It has been definitely settled that, under the Constitution, full power is given to the Government to tax everything except exports (we have in mind certain exceptions such as State governments and their instrumentalities, salaries of Federal Judges, etc., but such exceptions have no influence upon the broad power of which we are speaking), but this power can only be exercised in certain ways. Direct taxes must be apportioned, excise taxes must be uniform.

Pollock v. *Farmers Loan & Trust Co.* (Rehearing) (1895), 158 U. S. 601, 637, determined that a tax on the

earnings of invested capital was a direct tax and void, not being apportioned; it is there stated:

> "Our conclusions may, therefore, be summed up as follows:
>
> First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.
>
> Second. We are of opinion that taxes on personal property, *or on the income of personal* property, are likewise direct taxes * * *" (Italics ours).

Then the 16th Amendment was passed to obviate the effect of the *Pollock* case.

This Amendment did not extend the taxing power of Congress to new fields; it did not create a new power; it simply *authorized* a direct tax without apportionment on incomes (as that word was understood at the time of the adoption of the Amendment) "from whatever source (such income is) derived." *Brushaber* v. *Union Pacific Railroad Company* (1916), 240 U. S. 1; *Peck & Company* v. *Lowe* (1918), 247 U. S. 165.

The income tax act undoubtedly levies a direct tax. The word "direct" in the Constitution is used in its "natural and obvious sense." *Pollock* v. *Farmers Loan & Trust Company* (1895), 158 U. S. 601, 619. The tax is directly on the income itself, on the taxpayer on account of his ownership of the income; not on income belonging to some one else. *Flint* v. *Stone Tracy Company* (1911), 220 U. S. 107; *Eisner* v. *Macomber* (1920), 252 U. S. 189; and, in the case of a tenant for years or life tenant there is no possibility of shifting the burden. *Pollock* v. *Farmers Loan & Trust Company* (1895), 158 U. S. 601; *Knowlton* v. *Moore* (1900), 178 U. S. 41, 82.

On its face this tax has no resemblance to an excise tax or duty, and no claim is made that if the bequests in question are not properly directly taxes as income they are taxed at all.

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.
>
> "In order, therefore, that the clauses cited from Article 1 of the Constitution may may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, *it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form.* Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." (*Eisner* v. *Macomber* (1920), 252 U. S. 189, 206).

The precise question then is, are such bequests 'income," as that word is used in the 16th Amendment? As so used the word has been defined by this Court. Thus, any property which does not fairly come within that definition, which is not in fact income as so defined, cannot be directly taxed and is not embraced in the law, even though Congress may specifically include it.

Our contention is that the property in question is in

no sense income to the recipient, but is a bequest, a pure gratuity; that any construction that gives this income tax law the effect of taxing such a bequest would make the Act to that extent unconstitutional.

We do not contend that the Act of 1913 is unconstitutional; far from it. But we do contend that if it has the effect the Government claims, and discloses a plain intent by Congress to tax as income property which is not taxable income under the definition adopted by this Court, the Act to that extent is a nullity. We submit that the Act cannot be so construed; on the contrary, that property gratuitously acquired has never been considered as income.

Property acquired by bequest had never at the time of the passage of the 1913 Act been regarded by Congress or the Treasury as income and subject to a direct tax.

This subject is so fully covered in *Pollock* v. *Farmers Loan & Trust Company* (1895), 157 U. S. 429, and *Knowlton* v. *Moore* (1900), 178 U. S. 41, that it needs no elaboration. Unless the present Acts can be considered as attempting to tax bequests, legacies, or inheritances directly, it may be said that Congress has never regarded such property as subject to a direct tax, but as property that could only be reached indirectly by an excise, legacy or succession tax, which is the antithesis of a direct tax. *New York Trust Company* v. *Eisner* (1921), 256 U. S. 345.

There is one exception to this statement which demonstrates that bequests, legacies, are not taxable as income. The Act of 1894, which was condemned in *Pollock* v. *Farmers Loan & Trust Company*, purported to tax "gains, profits and income."

Chief Justice White, in his opinion in *Knowlton* v. *Moore* (1900), 178 U. S. 41, 52), says:

> "In the statute of August 27, 1894 (28 Stat. at L. 509, C. 349), what was in effect a legacy tax was imposed by the provisions of Section 28. Ib. 553. The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax, since among the items going to make up the annual income which was taxed was 'money and the value of all personal property acquired by gift or inheritance.' This law was not enforced."

It is obvious that such a tax, levied directly on the legacy, would be void, in view of the Court. That was the very question in *Knowlton* v. *Moore* (1900, 178 U. S. 41, where it was argued that the tax, imposed by virtue of the Act of June 13, 1898, was directly upon the bequest, and, not apportioned, was therefore void.

The opinion of the Chief Justice practically admits that, if direct, the tax would be void, but found it to be an excise, a legacy tax, hence not direct within the meaning of the Constitution and subject only to the test of uniformity. That case is and must be authority for the proposition that a bequest of income on a fund for life is a legacy, a bequest. It, with the *Pollock* case and *Eisner* v. *Macomber*, must also be authority for the proposition that such bequests constitute a class of property that cannot be directly taxed, without apportionment, as not being income within the meaning of the 16th Amendment. Further, that such bequests, legacies, or gifts can only be reached by an excise, a succession or legacy tax.

So far as we are aware, it has never been contended that the 16th Amendment had the effect of changing a direct to an indirect tax; that is, that a tax levied directly on a legacy, invalid as a direct tax before the Amendment, became an indirect tax and valid after the Amendment. On the contrary, it has been repeatedly argued to

this Court that various Acts passed since the 16th Amendment which in effect taxed legacies or bequests, commonly called legacy taxes, were invalid as being direct taxes, and this Court has invariably sustained said Acts on the sole ground that they were not direct taxes, but were in the nature of an excise or duty.

In *Griener* v. *Lewellyn* (1922), 258 U. S. 384, 386, it is stated:

> "That the Federal government has power to tax the transmission of legacies was settled by *Knowlton* v. *Moore,* 178 U. S. 41; and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The latter case has established also that the estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. *Pollock* v. *Farmers' Loan & Trust Co., supra.* A state may impose a legacy tax on a bequest to the United States, *United States* v. *Perkins,* 163 U. S. 625, or on a bequest which consists wholly of United States bonds, *Plummer* v. *Coler,* 178 U. S. 115; *Orr* v. *Gilman,* 183 U. S. 278. Likewise the Federal government may impose a succession tax upon a bequest to a municipal corporation of a State. *Snyder* v. *Bettman,* 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax, *New York Trust Co.* v. *Eisner, supra.*"

As Mr. Justice Holmes states in *New York Trust Company* v. *Eisner* (1921), 256 U. S. 345, 349:

> "Upon this point a page of history is worth a volume of logic."

Is not the assumption justified that if the power existed in Congress, as it does in the States, to levy a tax directly upon legacies, and bequests, that power would have been exercised instead of the indirect method which has been followed from the beginning? And that if the 16th Amendment granted the power to include gifts and bequests as taxable income that power would have been clearly exercised by Congress?

The 16th Amendment means the same now as it did when adopted; at that time bequests such as are here considered were regarded as bequests or legacies to the beneficiary (see cases cited in Subdivision I of this brief) and were not thought of as income; therefore, such bequests cannot now be regarded as intended to be covered by the Amendment. *Merchants' Loan & Trust Company* v. *Smietanka* (1921), 255 U. S. 509, 519.

The Act of 1867 provided for a tax on

> "gains, profits and income whether derived from any kind of property, rents, interest, dividends or salaries * * * or from any source whatever."

The Commissioner of Internal Revenue ruled upon this provision (7 Internal Revenue Record 59; Washington, February 18, 1868):

> "Gifts of money, when clearly not in the nature of payment for services rendered, or other valuable consideration, are not liable to taxation as income."

An earlier decision by the same official states:

> "Legatees are not required to return their legacies as income. There is a specific tax on legacies of personal property in Section III" (Boutwell, Direct and Excise Tax System of the United States; 1863, page 275).

In *Turner* v. *Cuxon,* L. R. 22 Q. B. D. 150 (1888) Lord Chief Justice Coleridge reached the same conclusion with respect to gifts under the British Income Tax Acts of 1842 and 1853, which levied a tax upon the "annual profit or gain arising from any kind of property" or "from any profession, trade, employment, or vocation." In that case it appeared that Cuxon had received a sum of money from the Curates' Augmentation Fund in recognition of his deserving record as a curate. After stating the facts, the Lord Chief Justice said:

> "Now is this sum in the hands of the curate assessable to the income tax? It is, if it is an 'annual profit or gain arising from any kind of property' or 'from any profession, trade, employment or vocation'; but it clearly does not so arise; it comes at the mere will of this charitable society."

The 1913 income tax act is not an excise; it is a direct tax and a direct tax on only one subject matter, incomes. Congress could not, if it attempted to do so (and we submit it has not so attempted in this Act) by mere words change the essential characteristics of taxable property. Thus, it can not, without apportionment, directly tax capital under the guise of an excise.

> "Undoubtedly, in the course of the opinion in the *Pollock case,* it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been con-

> sidered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." (*Knowlton* v. *Moore* (1900), 178 U. S. 41, 81.)

That this, in fact, is still the understanding of the Treasury appears from *Article 73, Treasury Regulations 45* (1918 Act), which reads:

> "Money or real or personal property received as gifts, or received under a will or under statutes of descent and distribution, are exempt from tax, although the income therefrom derived from investment, sale or otherwise is not."

It accordingly appears that prior to the proposal of the Sixteenth Amendment, the Treasury Department, the English courts, the Supreme Court of the United States, and Congress itself had all recognized that gifts are not generically income. The word "income" having been thus universally construed prior to 1913 as excluding property acquired by gift, bequest, devise, or descent, it follows that the people in enacting the Sixteenth Amendment and Congress in enacting the 1913 Act must have adopted the same construction. This is an elementary rule of interpretation (*U. S.* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337; *N. Y., etc., Rd. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Robertson* v. *Downing,* 127 U. S. 607).

Such property is not covered by the definition of taxable income under the 16th Amendment.

The Government relies wholly upon the definition of income given in Section II, B. (1), of the 1913 Act. That section (disregarding the express exception) construed as the Government construes it would, of course, include everything any one could possibly receive, but what is

income taxable under the 16th Amendment has been defined by this Court, and anything that does not come within that definition is not taxable, even though it may be covered by the broad language of the statute.

The definition of taxable income as given in *Eisner* v. *Macomber* (1920), 252 U. S. 189, 207, is:

> "After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).
>
> "Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain', which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. *'Derived—from—capital'; —'the gain—derived—from—capital,' etc.* Here we have the essential matter: *not* a gain accruing to capital, not a growth or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed* from the capital however invested or employed, and coming *in,* being *'derived'*, that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description."

The property now sought to be reached by the Government under this definition is money derived by the recipient not as a gain from capital, but as a gift under a will. So far as the recipient is concerned (and he is the only one in fact concerned, as he is the "taxpayer"), the money might as well drop into his hand from the sky. It is accumulated from no capital of his, is due to no labor or expenditure of energy, physical or mental, by him. It is produced by no fund under his dominion or control. It is a pure gratuity; a gift of personal property made by will.

The fact that the money finally paid to him as a gift represents a gain, or income, on capital belonging to some one else, does not make it income to the recipient. If A makes $10,000 and gives it to B, it is income to A but not to B. To hold that income, or gain, received by one person as the fruit of his capital or labor is income to another person when gratuitously transferred to him would automatically place all gifts and bequests in the category of income and call for a revision of the settled definition of the word. A bequest of income can not possibly be held to be a gain *derived by the beneficiary*, the taxpayer, from capital. To be income to the taxpayer it must be *derived* from capital or labor by him; that is, earned for him by *his* capital, or by capital under his dominion or control, or *his* labor. Here it is, in fact, to the taxpayer, a bequest of capital. *United States* v. *Merriam* (1923), 263 U. S. 179.

Senator Cummins, in the course of his debate on the 1913 Act, said:

> "I do not think there is any man in America who would contend or could contend that a gift or devise or bequest of property or property coming to one by descent is income. I never heard of it being so construed, and it is not possible that it could be so construed." (Congressional Record, 63d Congress, 1st Session, Vol. 50, page 3488.)

It is conceded, we believe, that a bequest made by a will is not taxable as income. This must be conceded on the authority of *United States* v. *Merriam*. It must also be conceded as a matter of fact, and of law from the authorities cited, that a gift of income for years or for life, made by a will, is a bequest. Now what is there in law or logic to separate bequests so as to except the more valuable bequest from taxation and tax the lesser? It is conceded that a bequest of $100,000 to A, payable in annual installments of $10,000 per year, is not income and not taxable; yet, it is contended that if a fund is set aside by the same will, which will produce an annual interest of $10,000 and that interest is bequeathed to B so long as he shall live, the principal to go to someone else, such bequest is income to B and taxable as such. B obtains his property in exactly the same manner as A. He does not earn it and it is produced by no capital of his, nor under his control. It is just as much a bequest, just as completely a gift, as is the bequest to A. True the money is earned by capital, but that capital does not belong to the legatee. The installments bequeathed to A may likewise be earned by capital not belonging to A. All property has to be either earned or inherited sometime by someone; as inherited it is not income, as earned it is. What the beneficiary for life receives as his bequest is money, and on that money the tax is sought to be imposed. The actual amount of cash received by the beneficiary each year is taxed, and that cash is his bequest.

There is no question here of taxing the value of the life estate; this is not an excise or legacy tax; it is directly on the money actually received as it is received, and that money is a pure bequest to the beneficiary.

The money so bequeathed and received in no sense comes under the definition adopted by this Court as covering everything which Congress, under the 16th Amendment, is authorized to tax.

VII.

The construction sought by the Government would make the Act arbitrarily discriminatory. Such construction is to be avoided, if possible.

The Government insists that income received by a beneficiary for years or for life under the bequest of a will is taxable income to such beneficiary. Necessarily there is no difference on this question between bequest of income for life and one for years, assuming that in both cases the corpus of the estate goes to some one other than the beneficiary. The real basis for this contention is that the money which the beneficiary receives —be he one for life or for years—is in fact income on a fund and is therefore income to the recipient. This reasoning is falsified by the fact that income has been defined and under that definition a bequest is not income to the beneficiary. The Government would certainly admit that a bequest of $100,000 outright to a person is not taxable as it is not income. There is no more magic in the word "income" than there is in the words "gains" and "profits." *Gould* v. *Gould* (1917), 245 U. S. 151. We have referred before to the fact that there is nothing in the Constitution, the law or the decisions of this Court which warrants any subdivision of gifts into taxable and nontaxable classes, but to sustain the Government's contention in this case such classification must be made. A beneficiary for life or for years in the income of a fund created by will receives the money which is paid to him annually in just one way; from the bounty of the testator as made effective by his will. It is just as much a bequest, a legacy, as any other gift that a testator can make.

Assume that a testator gives $100,000 to A with instructions to his executors that such bequest is to be paid

in ten annual installments of $10,000 each, and in the same will he creates a fund to produce an annual income of $10,000, giving the income on such fund to B for ten years, and upon B's death the fund to go to some one else, then the claim is that A's bequest is not taxable because it is a bequest, while that to B is taxable because it is income to B.

To make it a little plainer, assume that the testator gives to A outright $10,000, and creates a trust fund that will bring in an income of $10,000 a year, giving the income on such fund to B for the first year, C for the second, D for the third, and so on, the fund itself to go to some one else. It is contended that the gift of $10,000 to A is not taxable because it is a bequest, while the respective payments which will be made to the other beneficiaries are all taxable as they are not bequests but income. This on its face is contrary to fact. There is no difference whatever among the recipients as to the manner in which they receive their property. None of them get it as income. All of them receive it purely as legacies, or gifts.

Assume again a bequest of $500,000 to A outright and a less valuable bequest, one of the income of $500,000, to B for life. The contention is that the greater bequest goes tax free, but that the lesser, the bequest to B for life, he must pay a tax on every cent that he receives. But it is argued this is fair, because while the bequest of $500,000 to A is not taxable, still the income on it is. This argument only illustrates the unfairness. A can do as he pleases with his $500,000. He pays no taxes whatever on it, and will pay no taxes at all unless he puts the fund to work so as to create taxable income. He may invest it in tax-exempt securities. He may allow it to lie idle in bank. He may waste it. In none of these cases will he pay any income

tax. It is clear that the only taxes he will have to pay in any event will be taxes on the income of the gift and not on the gift itself. But with B the case is different. He will first be taxed on what he receives under the will, on the gift itself. In addition, after he has received his gift as depleted by the tax exacted from it he will also have to pay additional income tax on whatever income this gift produces. Thus, by the same will, two persons who receive property in absolutely the same way—that is, as legacies—will be in two entirely different classes; in one class all legacies will be taxed; in the other they will be free from taxation. So construed the present income tax laws would be grossly discriminatory against beneficiaries for life and beneficiaries for years, the discrimination being wholly without basis.

Probably the most frequent form of bequest, aside from the direct bequest, is what is commonly known as a life estate in a fund. The absolute bequest which becomes the property of the beneficiary immediately is generally made to a beneficiary who is fully able and competent to take care of himself and the property bequeathed to him. A life estate, speaking generally, is usually created for the benefit of widows, minors and persons under some disability, physical or mental, for whom protection and provision is essential and for whom it has been demonstrated the safest provision is one which makes the gift available in installments sufficient to support the beneficiary so long as he or she shall live.

If any favoritism were warranted at all in classification, which as between these two classes would make the property given to one subject to depletion by tax and the other exempt from such depletion, undoubtedly the first should be subject to the tax and the second exempt. The construction sought to be placed upon the law by

the Government is directly opposite to this. The dependent takes her gift subject to an inescapable tax. The independent is absolutely exempt.

Assume the case of a testator having two children and a net estate of $1,000,000, which he desires to divide equally between them. One child is a son of mature years, in possession of all his faculties and self-supporting. To him the testator bequeaths $500,000 outright. The other child is an invalid daughter, with an uncertain expectancy of life, incapable of managing her own affairs and absolutely dependent upon the bounty of the testator. In order to make it certain that such daughter may exist in comfort so long as she lives, the testator creates a trust of $500,000, bequeathing to the daughter the income thereon, payable yearly so long as she shall live, and at her death the capital fund to someone else. According to the Government's construction the son would receive his $500,000, his bequest, absolutely free from any tax. He would never pay any tax on it until and unless he used it so as to produce taxable income and duly reported the same. The daughter, however, who is absolutely dependent upon the amount received as her bequest, would be obliged to pay a tax on the legacy paid to her annually to the full limit provided by the law. There would be no escape on her part from such taxation and it could not be evaded in any way. There could not be a more direct tax. In addition, whatever part of her gift, if any, was not used in her support would in turn be taxable if it produced income.

Widows, orphans and dependents whose sole support is derived in the form of legacies paid annually so long as they live, created by a fund in the hands of trustees, in which fund they have no right and over which they have no control, are taxed to the utmost limit. They are taxed first by the inheritance and income tax laws of the

State (in New York these taxes are very high). They are again taxed (indirectly) by the Federal estate tax, and if the Government is correct their legacies are still further depleted by the direct tax levied on their income by the Government; and should that income—which, of course, is the legacy—in turn produce income, that is also taxed. The construction sought by the Government would bring about a discrimination and classification in substance, not in theory. Practically endless examples illustrating the truth of this could be given in addition to those which we have set forth above. It would be hard to imagine a more baseless classification, a more arbitrary discrimination.

The following quotation from the opinion of Mr. Justice Sutherland in *United States* v. *Merriam* (1923), 263 U. S. 179, 187, holding a bequest to be not taxable income under the 1913 Act, is appropriate:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153. The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4 H. L. 100, 122:
>
> " 'I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in

any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see *Eidman* v. *Martinez,* 184 U. S. 578, 583.

"We are of opinion that these bequests are not taxable as income under the statute, and the judgment below is affirmed."

Respectfully submitted,

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